No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF ON THE MERITS BY PETITIONER

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I. THE RETRIAL OF THIS CASE AS URGED BY THE BRIEF OF THE SOLICITOR GENERAL IS NOT NECESSARY TO DETERMINE THE RIGHTS OF THE LITIGANTS.

In reply to the Brief of the Solicitor General on behalf of the United States as Amicus Curiae, the Oklahoma Tax Commission disagrees that this case should be retried in the District Court and opposes the suggestion made by the Solicitor General.

In part IIA, page 20, of the Solicitor's brief, the government argues that although the relevant federal statute, i.e. ***Sac and Fox Allotment Agreement of February 13,***

1891, 26 Stat. 749, did extinguish the Sac and Fox Reservation, a determination still needs to be made as to whether this case involves a "reservation community."

The concept of a possible "reservation community" is much too amorphous to prove up in an evidentiary hearing. This concept is not provable by hard evidence but would most likely be the subject of opinion testimony in a battle of expert witnesses. No doubt the record in this case would be bursting at the seams, but these "facts" would not advance our understanding of this case. The record in this case is clear enough on the point that Congress disestablished the Sac and Fox Reservation and opened the area for white settlement. These points are documented in the statutes and case law cited in the Commission's brief in chief in Section I.A of the argument dealing with the disestablishment of reservations in Oklahoma. The Solicitor's brief also points out in footnote 9 at page 12 that census data for the tribal membership and the affected counties is readily available to demonstrate that the Sac and Fox membership comprise less than 2% of the population in that area.

The authorities cited by the Commission are inconsistent with a theory that Congress intended to create, develop, maintain and perpetuate a "reservation community" for this Tribe within Oklahoma. The determination is a question of law to be based on the construction or interpretation of relevant federal statutes and is not a question of fact to be developed by testimony in an evidentiary hearing.

In Section II.B, pg. 22-23, of the Solicitor's brief, the United States is critical of the litigants' use of motions for

Summary Judgment in the trial of this case. The Commission submits that Summary Judgment is the appropriate method for this case. The essential facts are that the tribal government employs both members and nonmembers to work at the tribal headquarters on Indian Country. Some of these tribal employees live on Indian Country and some do not. The question is, given the action of Congress to disestablish the reservation, do these people owe state taxes. This question is answerable by the application of legal principles of Indian law developed by this Court in previous cases. It would not illuminate this inquiry to prepare an inventory listing of legal descriptions of the various tracts of Indian Country involved nor to introduce the testimony of all tribal employees as to their membership status, where they work, where they live and other personal information. This information would quickly become obsolete when, during the course of litigation, the employees move or change employment and would add a layer of complexity to a complex case. The legal complexity requires factual simplicity in this case.

The Solicitor urges further factual development in this case to determine the pre-emption issue by entering a particularized inquiry into the nature of the state, federal and tribal interests at stake. The Solicitor has an entirely different perspective of this case from that of the actual litigants. The United States has just recently entered the case at this level. The interest of the United States in this case, as stated on page 1 of its brief, is in the development of sound legal principles. However, the parties in this case have been litigating these issues for several years. The Commission and the Tribe brought this case to determine the rights and obligations of their citizens in a

dispute over money. The rights of the parties can be and deserve to be determined based upon the record presented. Furthermore, the people who will be responsible for any resulting tax liability are anxious to see a resolution of this case for their own personal tax planning. It would not serve anyone's purpose to remand this case merely to fine tune the evidence. Rather than remand, this case should be resolved.

In respect to whether a reservation community exists in Oklahoma, the Supreme Court has previously characterized this situation in ***Oklahoma Tax Commission v. United States***, 319 U.S. 598, at 603 (1943) as follows:

> The underlying principles on which these [reservation] decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in ***Worcester v. Georgia***, supra [6 Pet. 515]; and unlike the Indians involved in the ***Kansas Indians*** case, supra [5 Wall. 737] they are actually citizens of the State with little to distinguish them from all other citizens . . .

II. THE STATE INCOME TAX AS APPLIED TO TRIBAL MEMBERS DOES NOT INFRINGE TRIBAL SELF-GOVERNMENT.

The Solicitor's brief proposed that apart from the "reservation community" problem, the income tax could be barred in that the tax directly burdens the administration of the Tribe by increasing the cost of administering tribal affairs in areas subject to its jurisdiction.

This case is different from ***McClanahan v. Arizona Tax Commission***, 411 U.S. 164 (1973) in that the Arizona income tax was inapplicable because the ***Navajo Treaty***, 15 Stat. 667, was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. The **Sac and Fox Allotment Agreement** was meant to disestablish the lands as within exclusive tribal sovereignty. Therefore, the Solicitor is presenting an alternative in the form of intergovernmental immunity. This Court ruled in ***McClanahan*** at 411 U.S. 169-170 that to the extent that the tax exemption rests on federal immunity from state taxation, it may well be inapplicable in a case such as this involving an individual income tax.

The intergovernmental immunity doctrine has been rejected in this context in ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145 (1973) and ***Oklahoma Tax Commission v. Texas Co.***, 336 U.S. 342 (1949), where the Court ruled that so far as concerns private persons claiming immunity for their ordinary business operations, even though in connection with governmental activities, no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain the exemption. The taxes here are nondiscriminatory. The tribal employees are private persons who seek immunity for their income because they are engaged in tribal employment.

The reasoning that the taxation of a government employee interfered with the activities of the government was renounced in ***Graves v. People of the State of New York***, 306 U.S. 466 (1939) where the Supreme Court considered that the expansion of the immunity of the one

government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. The burden of an income tax on government employees as may be passed on to the government through increased price of labor is the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other.

Immunity may not be conferred simply because the tax has an effect on the government or even because the government shoulders the entire economic levy. What the Court's cases leave room for is the conclusion that tax immunity is appropriate in only one circumstance, when the levy falls on the government itself, or on an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned, ***United States v. New Mexico***, 455 U.S. 720 (1982). In this case the income tax falls entirely on the individual employee and the Tribe has no responsibility toward state law to withhold, report or pay over any amounts or perform any duties.

In reply to the infringement issues raised in the brief of the Sac and Fox Nation, the Tribes primary trust is that the old treaties of ***Fort Harmar***, 7 Stat. 28 (1789) and of August 19, 1825, 7 Stat. 272, effectively grant the Sac and Fox Nation exclusive jurisdiction over all persons who "settle upon their lands" thus leaving no room for state taxation. These treaties were made when the Tribe inhabited lands in other states and involved circumstances much different than those we deal with today. Those treaties did not contemplate the Tribe's current situation and by no means were those treaties the final word from Congress regarding the Sac and Fox. The treaty of 1789 was consummated before the United States had eve.. acquired the territory encompassing the State of Oklahoma in the Louisiana Purchase of 1803. Both treaties preceded the Tribe's removal to Indian Territory (1867), the disestablishment and opening of the Tribe's Reservation (1891) and Oklahoma Statehood (1907). The old treaties cited by the Tribe were abrogated by Congress and are of no use to this Court for the purpose of determining the rights of the parties in this case.

Finally, the Tribe argues that if tribal members are liable for state taxes, the effects on a tribe's ability to govern itself would be disastrous. However, the Tribe does not explain specifically how a tribal government will fail because a tribal member has to buy a state license plate for his or her car or pay income taxes to the state. There are forty different tribes in this state and those tribes all have existing governments. Many tribes are facing a variety of governmental problems but none of those problems can be traced to a tribal member's payment of state taxes, and no tribal governments have

expired due to that reason. If this Tribe is experiencing governmental difficulties, it would be more fruitful to look other than at the Commission for the root causes.

CONCLUSION

For the reasons stated in its briefs to this Court, the Oklahoma Tax Commission respectfully requests this Court to reverse the judgment of the United States Court of Appeals as to the issues presented in the Petition in this case.

February, 1993.

Respectfully submitted,

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